

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-1595-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN FONTECCHIO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed and cause remanded with directions.*

¶1 CANE, C.J. Ryan Fontecchio appeals from a judgment convicting him of one misdemeanor count of disorderly conduct, contrary to § 947.01, STATS. Fontecchio argues that the circuit court erred by allowing revocation of his deferred prosecution agreement. Because the circuit court deferred to the district attorney's discretionary decision to revoke rather than finding that Fontecchio had

failed to comply with the agreement's conditions, the circuit court's judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

¶2 Fontecchio was charged with one count of attempted battery and one count of disorderly conduct arising out of a familial dispute. On January 28, 1998, Fontecchio entered a no contest plea to the disorderly conduct charge and entered into a twelve-month deferred prosecution agreement.¹ The agreement provided, in part:

It is understood that upon written notice by either the defendant or the District Attorney to the other prior to completion of the period of this agreement, the agreement shall be terminated for violation of the terms of said agreement and prosecution may resume at the point it was suspended.

The condition at issue here required “[n]o further domestic abuse incidents or criminal violations occurring during the term of the Deferred Prosecution Agreement.” Apart from specifying its terms, the agreement required Fontecchio to file with the district attorney a bi-monthly written report certifying his compliance with these terms.

¶3 In December 1998, Fontecchio informed the district attorney that he had received citations for possession of marijuana and underage drinking. The State thereafter filed a termination notice and notice of hearing on revocation of the agreement. The circuit court allowed the revocation, convicted Fontecchio of

¹ The circuit court, on its own motion, consolidated the instant file (#97-CM-1804) with another file (#97-CM-1594) and although the record does not describe the specifics of the other file, Fontecchio's no contest plea to disorderly conduct applied to both cases. The record, however, does not explain what happened to the attempted battery charge.

one count of disorderly conduct and placed him on one year of probation. This appeal followed.

¶4 Fontecchio argues that the trial court erred by deferring to the district attorney's discretionary decision to revoke the agreement rather than making its own factual determination as to the existence of a violation of the agreement's conditions. Specifically, Fontecchio asserts that the agreement's terms require proof of a criminal violation before revocation. This court agrees.

¶5 Although Fontecchio awaited trial following his not guilty pleas to the possession and underage drinking allegations, the circuit court did not engage in factfinding as to the existence of the criminal violations. Rather, it deferred to the district attorney's discretion in the matter. Although the district attorney offered to prove the alleged criminal violation with testimony of the citation-issuing officer, the court stated:

I don't think that's necessary. I've read the citation and the attached statement by the officer detailing the fact that the officer spoke to [Fontecchio] and then [Fontecchio] indicated that marijuana could be found in the glove box, some small amounts of marijuana, and items were placed into evidence as a result of that, and also underneath the passenger seat, he said.

Well, *based upon that I don't believe that the district attorney has abused his discretion in deciding to revoke this*. This is a pretty high burden for the defendant to establish or to show, I guess, that they have not—that the district attorney has abused their discretion. The district attorney, on the other hand, doesn't have to show too much to show that they did not abuse their discretion, and I think this exhibit tells the Court that the revocation was proper by the district attorney's office. So the Court will grant the request to revoke. Actually, I think the district attorney's office has already revoked. I just affirm that decision at this time. (Emphasis added).

¶6 The terms of the deferred prosecution agreement allowed for revocation if Fontecchio had any further criminal violations occurring during the agreement's twelve-month term. When a prosecutor decides to revoke a deferred prosecution agreement, a defendant has a due process right to have factual disputes resolved by a neutral factfinder because the rights at stake are similar to those involved in probation revocation.

¶7 Where, as here, the existence of a criminal violation serves to justify the revocation of a deferred prosecution agreement and a defendant maintains his innocence as to the violation alleged, due process requires a circuit court to find that the defendant did, in fact, commit the violation. The State has the burden of proving that Fontecchio breached the agreement. Once the court has resolved the factual disputes, thereby determining whether a violation of the agreement has occurred, it has a basis for reviewing the reasonableness of a prosecutor's decision to revoke. A circuit court may not simply defer to a prosecutor's discretionary, not to mention unilateral, decision to revoke a deferred prosecution agreement.²

¶8 Because a circuit court's review of a prosecutor's revocation decision should consist of assessing its reasonableness in light of the facts the court determines at hearing, the judgment is reversed.

² Although Fontecchio argues alternative grounds for reversing the circuit court's judgment, this court's resolution of the issue presented is dispositive of the appeal. See *Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

By the Court.—Judgment reversed and cause remanded for further proceedings consistent with this opinion.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

